

ELRICH CONTRACTING, INC.**CONTRACT NO. V688C-1203
4629E****VABCA-4625E -****VA MEDICAL CENTER
WASHINGTON, D.C.**

Francis J. Pelland, Esq., Bell, Boyd & Lloyd, Washington, D.C., for the Applicant.

James Petersen, Esq., Trial Attorney; *Stacey North Willis, Esq.*, Trial Attorney; and *Phillipa L. Anderson, Esq.*, Acting Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

Elrich Contracting, Inc. (Elrich or Applicant) has submitted an application under the Equal Access to Justice Act (EAJA or the Act), 5 U.S.C. § 504, to recover attorneys fees alleged to have been incurred in connection with its prosecution of Elrich Contracting, Inc., VABCA Nos. 4625 - 4629. These five appeals were filed as a result of the Contracting Officer's issuance of purported "final decisions," in the form of Settlements by Determination, in the absence of Elrich's submitting any claims.

As a result of this premature action on the part of the Contracting Officer (CO), Elrich retained an attorney and incurred legal expenses appealing those final decisions. Ultimately the appeals were dismissed for lack of jurisdiction, but not before Elrich had incurred attorney fees in the amount of \$1,406.25.

Applicant seeks these attorney fees and argues that it would not have incurred them if the CO had not inserted final decision language into the five Settlements by Determination causing Elrich to undertake its protective appeals.

The Government counters, arguing that since no proper CDA claims were submitted to the CO, the Board was without jurisdiction to hear the underlying appeals, and is likewise without jurisdiction to consider an application under EAJA.

On April 14, 1995, the Board received and docketed as VABCA Nos. 4625 through 4629 Elrich's "protective appeals" of five Settlements by Determination containing final decision language. In its Notice of Appeal Elrich wrote that it was the prime contractor for a telephone system site preparation contract which called for the installation of telephone conduit above a hung ceiling at the Department of Veterans Affairs (VA) Medical Center, Washington, DC. Elrich alleges that the congestion it encountered above the ceiling tiles was unexpected and rose to the level of a differing site condition, and that "the method of overcoming the condition was determined [and] the parties reached agreement on the additional direct costs of the labor and materials required to perform the changed work." However, the Applicant averred that it "expressly reserved its right to seek additional time and delay-related costs because the nature of the differing site condition, together with the indication that the same type of congestion would be

encountered throughout the remainder of the project, made it impossible to determine realistically the time and cost impact upon the overall performance schedule." Elrich went on to say that the CO issued proposed bilateral modifications which contained accord and satisfaction language. "Since this waiver language violated the parties' agreement," Elrich returned the modifications unsigned. The CO then reissued the modifications as "unilateral modifications that retained the accord and satisfaction language." These modifications stated,

This change represents full and complete compensation for all costs, direct and indirect, associated with the work and time agreed to herein, including but not limited to, all costs incurred for extended overhead, disruption or suspension of work, labor inefficiencies and impact costs.

The modifications also differed from the earlier versions, in that the CO added language to each of the modifications which stated, in pertinent part:

You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals

Elrich closed its Notice of Appeal, stating, "the contractor now requests that the Board dismiss the appeal without prejudice on the grounds that the record does not establish the existence of any appealable final decisions within the meaning of the Contract Disputes Act [CDA]."

The Board directed the parties to SHOW CAUSE why the appeals should not be dismissed for lack of jurisdiction, because, as Elrich stated in its Notice of Appeal, "the record does not establish the existence of any appealable final decisions." Government Counsel filed its reply on May 8, 1995, conceding that although "[e]ach Settlement by Determination contained final decision language," the Applicant "has not filed a written claim with the contracting officer." Accordingly, on May 10, 1995, an Order was issued dismissing the five appeals for lack of jurisdiction, pursuant to Board Rule 5.

On June 7, 1995, Elrich filed an APPLICATION FOR AWARD OF ATTORNEY'S FEES UNDER 5 USC § 504 (Application). The Board issued an Order on June 13, 1995, noting that the Application was premature, as it had been received before the decision was final based on the Board's decision in *Farquhar Construction Company, Inc.*, VABCA Nos. 1702E, 1703E, 1704E, 87-2 BCA ¶ 19,789, holding at 119,142, that a "dispositive action by the Board with respect to a claim before it--by decision or by order--may be appealed and thus does not become final until the time for appeal to the Federal Circuit of that action has expired." Therefore, the Application was placed in suspense status until the decision became final. The Applicant responded to the suspension, stating that it considered the May 10, 1995 decision "to be final for the purpose of EAJA applications." Applicant went on to explain:

This was a unique case in that the Respondent's Motion to Dismiss on the grounds of lack of jurisdiction was precisely

the relief I had requested in taking the protective appeal. The only issue was whether the self-styled "final decisions" of the contracting office were or were not final decisions within the meaning of the Contract Disputes Act.

The Respondent's Motion to Dismiss accepted Appellant's position and requested the same relief sought by the Appellant. In effect, then, your May 10 [decision] represented the position of both parties and was entered with their mutual consent. Under these circumstances, both parties waived any right of appeal, which meant (to me) that your [decision] indeed was a final disposition of the appeal for all purposes.

In response to the Applicant's request, the Board issued an Order on July 11, 1995, modifying its previous Order and removing the Application from suspense status. On July 24, 1995, the Government filed its MOTION TO DISMISS (Motion). Elrich filed its RESPONSE TO MOTION TO DISMISS (Response) on July 31, 1995.

Applicant argues it was forced before the Board by the actions of the VA. Elrich states that after the parties had negotiated an agreement, the CO, "despite her knowledge that the . . . contractor was reserving its claims," issued proposed modifications containing accord and satisfaction language. Although Elrich asked the CO to remove the language, she issued unilateral modifications containing the same language and added final decision language. Elrich then wrote to the CO, twice, asking her to remove the accord and satisfaction language. When no reply was received, Elrich filed its appeals with the Board to preserve its "right to seek such further equitable adjustments." In its Response, the Applicant states that it "took these appeals solely in order to obtain the Board's timely confirmation that the contracting officer's 'final decisions' were meaningless and therefore would not bar a later delay claim arising out of the differing site conditions which were the bases for these unilateral modifications." (Response at 2)

The question in this Application is whether the Board has the jurisdiction to award EAJA fees to an Applicant who undertook protective appeals from Settlements by Determination containing final decision language.

Elrich admits that "the record does not establish the existence of any appealable final decision" within the meaning of the CDA. (Notice of Appeal at 3) However, Applicant maintains that:

It is unconscionable . . . for the same attorney who presumably counseled the contracting officer to ignore Appellant's request to delete the offending final decision language, thereby forcing Appellant to file these appeals, now to be heard opposing Appellant's request for reimbursement of some of the legal fees it expended as a direct and necessary result of his advice to the contracting officer.

(Response at 2)

For its part, the Government contends that "based on the absence of an underlying claim . . . the Board is without jurisdiction under the CDA." (Motion at 1) Next, the Government argues EAJA is a "limited waiver of sovereign immunity" which only applies to "fees incurred in an adversary adjudication consisting of 'any appeal of a decision pursuant to section 6 of the Contract Disputes Act.'" The Government concludes by stating that, "in view of the Board's express lack of jurisdiction under the CDA of Appellant's attempted appeals, Respondent asserts that the Board is likewise without jurisdiction to consider an EAJA claim based on the appeals." (Motion at 2)

The Board sympathizes with the Appellant's contentions that the actions of the CO "forced" the Applicant to take these appeals and that Elrich was only acting to protect its rights, particularly since we have on a number of occasions pointed out the impropriety of such language in the VA's Settlements by Determination. *Penn Environmental Control, Inc.*, VABCA Nos. 3599, 3600, 93-3 BCA ¶ 26,021; *Interstate Contractors, Inc.*, VABCA No. 3404, 92-1 BCA ¶ 24,480; *George Hyman Construction Co.*, VABCA No. 3078, 90-1 BCA ¶ 22,551.

Notwithstanding the VA's obstinate refusal to delete such appeal language when there is no CDA claim pending, we are constrained in terms of remedy by the fact that EAJA is a limited waiver of sovereign immunity, which grants Boards of Contract Appeals the authority to award attorney fees and expenses only in appeals from decisions "made pursuant to Section 6 of the Contract Disputes Act of 1978." 5 U.S.C. § 504(b)(1)(C). Thus, for a board of contract appeals to award attorney fees and expenses, that board must first possess jurisdiction of the underlying claim, pursuant to the CDA. *Oklahoma Aerotronics, Inc.*, ASBCA No. 28006, 88-3 BCA ¶ 20,917; *Maitland Brothers Co.*, ASBCA No. 24032, 86-2 BCA ¶ 18,796. In *Bogue Electric Manufacturing Company*, ASBCA Nos. 25184, 29606, 89-3 BCA ¶ 21,951, the contractor failed to certify a portion of its claim docketed as ASBCA No. 25184:

The Board concluded that it lacked jurisdiction over the equitable adjustment claim because the claim was not certified when submitted to the contracting officer . . . we held that once an election to proceed under the CDA was made, all the requirements of the CDA, including the certification requirement were required.

89-3 BCA ¶ 21,951 at 27,413.

In *Bogue*, the claims were dismissed without prejudice and subsequently certified and resubmitted to the contracting officer. When the contracting officer denied the claims, the contractor appealed this decision, and the matter was docketed as ASBCA No. 29606. In discussing the scope of recovery under EAJA, the ASBCA denied recovery of attorney fees for the dismissed appeal and noted:

The language of the Act clearly limits the jurisdiction of the Board to award fees and other expenses to those appeals processed pursuant to the CDA. In our interlocutory opinion . . . we dismissed without prejudice the original equitable adjustment appeal for failure to meet the CDA

certification requirements. Thus, no appeal complying with the CDA was properly before the Board until a timely appeal was filed on 17 April 1984 from the contracting officer's 3 April 1984 decision denying the certified claims.

Given the limitation of fee and expense to recovery to CDA appeals . . . we conclude that Bogue's recovery on its fee application is limited to fees and expenses allocable to ASBCA No. 29606 from the date that appeal was prepared and filed.

89-3 BCA ¶ 21,951 at 27417-18.

In the matter currently before us, we determined in our decision of May 10, 1995, that Elrich had not submitted a claim to the CO. Accordingly, pursuant to Board Rule 5, we dismissed VABCA Nos. 4625-4629 for lack of jurisdiction noting that:

41 U.S.C. § 605(a) provides that the statutory prerequisite for invoking the jurisdiction of this Board is the submission of a "claim" by [Elrich] which must "be in writing and shall be submitted to the contracting officer for a decision." In the absence of an underlying claim on which to base a final decision the Board is without jurisdiction.

(Order dated May 10, 1995 (citations omitted)).

Under the facts presented here, the CO's premature issuance of unilateral modifications or Settlements by Determination, as final decisions with appeal language, likely precipitated Elrich's "protective" appeals. The Applicant may well have incurred attorney's fees as a result of its "protective" appeals. Unfortunately for Elrich, this is a situation not contemplated by EAJA. EAJA is a waiver of sovereign immunity which "lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, [but] does so only to the extent explicitly and unequivocally provided." *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1386 (Fed.Cir.), cert. denied, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 103 (1983). Applications for attorney fees and expenses under EAJA are recoverable only for adversary actions conducted pursuant to Board jurisdiction. As we concluded in our May 10, 1995 decision, Elrich did not submit a claim, hence, there is no contracting officer's final decision or proper appeal therefrom to trigger EAJA coverage.

DECISION

For the reasons set out above, Applicant's Application under EAJA for attorney's fees and expenses is denied.

DATE: **September 21, 1995**

GUY H. MCMICHAEL, III
Chief Administrative Judge
Panel Chairman

We Concur:

DAN R. ANDERS
Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge